KensingtonSwan
LAWYERS

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Financial Markets Policy
Building, Resources and Markets
Ministry of Business, Innovation & Employment
PO BOX 1473
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New Zealand

Submission – Financial Services Legislation Amendment Bill

1 This is a submission by Kensington Swan relating to the Ministry of Business, Innovation & Employment ('**MBIE**') consultation paper ('**Consultation Paper**') on the draft Financial Services Legislation Amendment Bill ('**Bill**'). The Bill will introduce an improved regime for the regulation of financial advice in New Zealand. The Consultation Paper seeks feedback on the Bill generally, and on the proposed transitional arrangements for industry participants.

About Kensington Swan

2 Kensington Swan is one of New Zealand's premier law firms with a legal team comprising over 100 lawyers acting on government, commercial, and financial markets projects from our offices in Wellington and Auckland. The Chambers Asia-Pacific 2017 guide ranks Kensington Swan as Band 1 in Investment Funds, and ranked financial markets partners Catriona Grover and David Ireland as Band 1 lawyers. We act for many advisers, QFEs, brokers, and other financial markets participants. We have considerable experience in assisting our clients with their regulatory compliance obligations and initiatives aimed at providing effective, relevant financial advice services to consumers.

General comments

3 We support the Bill's incorporation of financial advice services into the existing financial markets machinery in the Financial Markets Conduct Act 2013 ('**FMC Act**'). We believe the Bill will address a range of issues identified with the current Financial Advisers Act 2008 ('**FA Act**') regime, and will ultimately improve the quality and accessibility of financial advice in New Zealand.

4 There are however a few key drafting points that we believe are likely to be counterproductive to achieving the Bill's objectives. We have outlined those concerns in our submission points below.

5 We also address the questions raised in the Consultation Paper, following the order raised in the Consultation Paper.

6 For convenience, **attached** to this letter is a copy of the submissions template provided by MBIE with our submission points incorporated in the format requested. However, as that template is unable to show formatting, we recommend you refer to this letter as Kensington Swan's actual submission.

7 Our comments in this submission reflect MBIE's request for comments of a technical nature. We have not sought to raise matters of policy where Cabinet decisions have already been made.

Part 1

Questions 1 and 2

8 Currently, the prohibition on a person offering financial products for issue or sale to a person who is acting otherwise than in trade in the course of, or because of, an unsolicited meeting (set out in section 34 of the FMC Act) does not prohibit an offer of financial products if:

- the offer is through an authorised financial adviser or a QFE adviser who is acting in the ordinary course of business as a financial adviser; or
- the offer is an offer of quoted financial products made to a person through a person who, under the FA Act, is permitted to give personalised financial advice to that person in respect of those products (including as a result of an exemption by or under the FA Act).

9 It is proposed to extend this situation, so that the prohibition does not apply to an offer of financial products made by any financial advice provider.

10 We support this extension and do not think that any further restrictions should be placed upon the ability for a financial advice provider to make an offer in the course of, or because of, an unsolicited meeting. This is because:

- All financial advice providers are to be licensed and subject to a Code of Conduct ('**Code**') which will impose the same duties upon each of them. That being the case, it seems inappropriate to differentiate between them, particularly because such mechanisms should provide an avenue to address any potential harm to consumers that could indirectly arise from extending the scope of persons to whom the prohibition does not apply.
- To facilitate the Bill's purpose of increasing access to advice, financial service providers need to be able to discuss a range of investment options without needing to be concerned about legal boundaries.
- We are not aware of any unintended consequences or issues that would necessitate restrictions or further protections being introduced.

11 To be clear, we are not supportive of this being used to circumvent prohibitions on door-to-door sales practices.

Question 3

12 A 'financial advice service' is defined to mean the service of giving regulated financial advice as referred to in section 431C. The placement of the words 'as referred to in section 431C' at the end of the definition implies that the meaning of regulated financial advice is set out in section 431C when this is not the case (that term is defined in section 431B(3)). Accordingly, we suggest moving the reference so it reads as follows:

financial advice service means the service (referred to in section 431C) of giving regulated financial advice.

13 It is proposed to add to the definition of 'acquire' so that in relation to a renewal or variation of the terms or conditions of an existing financial advice product, it will include entering into the legal relationship that provides for the renewal or variation. It is unclear how this definition would operate in practice, particularly in the absence of any clear policy rationale for the change. For example, if a subscription agreement entered into by an investor expressly contemplated a future variation, would the investor be taken to have acquired both the financial product, and the financial product as varied, at the time when they entered into the agreement (being the document that establishes the legal relationship)? What if the variation was conditional on other events occurring in the future? The drafting should therefore be amended to remove such ambiguity.

14 Finally, it is proposed to amend paragraph (b) of the definition of 'dispose of' to add the following words (shown in italic):

dispose of-

(a) ...

(b) includes withdrawing from, terminating, or closing out the legal relationship that constitutes the financial product *or other financial advice product*; and

15 Because the definition of 'financial advice product' incorporates 'financial products' it seems unnecessary to refer to both definitions. We suggest, instead of inserting the italicised words above, it would simplify the drafting to simply insert the word 'advice' before the last word.

Part 2

Question 4

16 We support the flexible approach to licensing requirements for certain 'financial advice providers' introduced by Part 2. We submit that the licensing requirements should retain their current flexibility, and agree that the Financial Markets Authority ('**FMA**') should determine detail through the process, rather than locking detail into legislation. This will allow for a proportionate, risk-based approach to be taken to licensing decisions. We encourage the FMA to ensure that compliance costs are not unduly burdensome, and to focus licensing queries on the mechanics of the delivery of financial advice by the relevant provider.

17 We have the following specific feedback on the drafting of Part 2 of the Bill:

- We suggest a definition of 'client' is added to section 6 of the FMC Act, for consistency with the approach taken to the terms 'retail client' and 'wholesale client'. It would read as follows:

  client, in relation to a financial advice service or a broking service, has the meaning set out in **clause 1 of Schedule 5**

- Currently, section 400(1)(c) uses the wording, 'will not comply with', and section 400(1A)(c) uses the alternative wording, 'likely to contravene'. As these appear to be

attempting to address the same issue, we suggest that, for consistency, one of these provisions is amended so that the same wording is used in each.

- We submit that there is a drafting issue in both sections 410(b) and 414(3). At present, the sections refer to 'the applicant or body corporate (or entity)'. For consistency with the terminology used in the sections cross-referred to in these sections, we suggest these references should be changed to 'applicant, related body corporate, or entity'.

Part 3

Question 5

18 Putting to one side the more problematic issues we have with the proposed client first duty (see Question 8 below), we agree in principle that the duty should apply when giving advice or doing anything in relation to the giving of advice. This scope of application makes sense and reflects the current position under the Code, whereby an authorised financial adviser ('**AFA**') must place the interests of the client first when undertaking any activity 'that relates to the AFA's financial adviser services'.

19 While we agree in principle with the proposed scope, we note that the wording 'In giving the advice or doing anything in relation to the giving of advice …' seems to contemplate that advice must first be given in order for the duty to then apply to other things done in relation to the giving of that advice. This is inconsistent with the example given in the Consultation Paper, which explains that the duty is also intended to apply where an adviser is determining whether to give advice or to provide an information-only service (i.e., in situations where no financial advice is given). The current drafting does not provide for this. In order to capture these types of situations, section 431H should be expanded to include reference to the 'possible giving of advice'.

Question 6

20 We generally agree with the proposed wording insofar as the test as to whether a payment or incentive is 'inappropriate' should be one of substance over form. This is important as it prevents 'banning' specific types of fee structures, providing scope and flexibility for industry participants to retain existing payment structures (and adopt new payment structures) best suited to their specific business models.

21 A negative impact of the proposed duty is that, without clear guidance from FMA, there is likely to be widespread uncertainty as to what types of payments / incentives are considered inappropriate. It is important that clear guidance be issued in advance of the new regime coming into effect so that providers have sufficient time to make changes to their fee structures (if necessary).

22 We note that the proposed test refers to whether a payment or other incentive is intended to encourage, or is likely to have the effect of encouraging 'the financial advice representative to whom it is given or offered' to contravene a duty. This could be interpreted as requiring a financial advice provider to make an assessment as to appropriateness on a representative-by-representative basis (i.e. having regard to the specific characteristics and personality traits of each representative in question).

23 We submit that the above position is undesirable and that the test should include a reasonableness overlay, whereby payments and other incentives are instead assessed from the point of view of a reasonable financial advice provider. We suggest redrafting sub-section 431O(2) as follows:

> (2) In this section, a payment or other incentive is **inappropriate** if it is intended to encourage, or if a financial advice provider would reasonably expect it is likely to have the effect of encouraging, the financial advice representative to whom it is given or offered to engage in conduct that contravenes any duty under **sections 431F** to **431M**.

Question 7

24 We do not support extending the client-first duty to providers who only advise wholesale clients. To do so would be unduly paternalistic and inconsistent with the very concept of 'wholesale clients', who should be capable of calling advisers to account.

25 Anyone giving regulated financial advice to a wholesale client will still be required to exercise care, diligence, and skill. We believe this duty offers sufficient protection for wholesale clients, particularly in light of the fact that clients can opt-out of being wholesale clients if they want to be treated as retail clients and obtain the benefit of additional protections.

Question 8

26 We have the following feedback in relation to the drafting of Part 3 of the Bill.

Duty to put client's interests first – section 431H

27 As foreshadowed in our response to Question 5, the drafting of the client-first duty is problematic for a number of reasons.

28 First, we note that the drafting of the client first duty does not seem to correctly reflect Cabinet's intention, as it reduces the application of the duty to a conflict of interest situation.

29 In addition, it is unclear to us how the duty (as drafted) can be satisfied in practice, particularly in the context of a vertically integrated structure. Where a financial advice provider manufactures its own products and has advisers and/or representatives selling those products, it seems unavoidable that the interests of the provider would be seen to materially influence the advice given. It is unclear what reasonable steps a financial adviser would be expected to take (or could take) to satisfy the duty in such circumstances.

30 We suggest that such a broad duty is best captured in statute at a high level only, leaving scope for the Code to cover the finer details of what must be done in order to comply with the duty. This approach would avoid the issues of the current drafting which would prevent the Code from expanding upon this duty or putting in place any conflict management requirements which are inconsistent with this duty.

31 Given that client first is a key duty of the new regime, it is critical that it is workable in practice. In addition, it is important that the duty does not unduly restrict advisers from facilitating investments into in-house products. In the absence of a drafting change, clear guidance will be needed to provide clarity to industry as to what is expected of them in order to discharge this duty, particularly given that civil liability may arise in the event of any breach. That being

the case, we submit that the FMC Act could expressly permit the Code to set out safe harbor standards for complying with relevant statutory obligations such as this duty.

32 We suggest the following possible solutions for redrafting of this section:

- Remove the client first duty from the FMC Act and put it back in the Code by simply requiring the Code to include such a duty. As noted above, this will retain more flexibility for the Code and/or guidance to be developed to provide clarity to industry.
- Delete the 'including by taking all reasonable steps' wording. This would remove the problematic 'materially influence' wording (see paragraph 29 above) and seems to be the approach taken in Australia – which refers to prioritising the client's interests in the event of a conflict (see section 961J of the Corporations Act 2001 (Cth)).
- Reframe the duty as a duty to act in the best interests of clients when giving advice or doing anything in relation to the giving of advice. Again, this could be supplemented by the Code and/or guidance.

Duty to agree on nature and scope of advice – section 431G

33 It is unclear how the nature and scope requirement applies to widely distributed documents (such as marketing collateral) containing what would currently be classified as 'class advice'.

34 The Code currently contains a deeming provision for class advice, where the client is deemed to have agreed to the nature and scope of the service. We suggest that a similar deeming provision be included within section 431G, to provide a mechanism by which the nature and scope requirement can be easily covered off when issuing marketing material containing advice. Alternatively this obligation could be left to the Code.

35 If no such deeming provision is included, providers may stop publishing marketing material containing class advice for fear of falling foul of the nature and scope requirement. This would be an undesirable outcome, and would run contrary to the Bill's stated objective of ensuring consumers can access financial advice.

Part 4

Question 9

36 We support the removal of the 'offering' concept, as we do not consider it to be an essential element of the definition. Removing the 'offering' concept will clarify the scope of applicability of the broker obligations contained in the new subpart 5B and we anticipate that the 'broker' definition will operate better in practice as a result.

Question 10

37 We strongly object to the inclusion of subsection 431X(2), which imposes an obligation to ensure that client money and client property are held separate from money or property held by the broker. Subsection 431X(2) replicates the current FA Act section 77P. We note that the original section 77P was not consulted on before coming into force.

38 Holding a 'buffer' amount in trading accounts is a fundamental element of trading, and has particular importance for international settlements. As a result, brokers are physically unable to comply with this obligation if they trade and settle on international markets.

39 We suggest that the reform opportunity of the Bill be used to address the buffer issue by removing the prohibition on the use of buffers by brokers. The need to remove section 431X(2)'s predecessor to enable brokers to carry out their business is reflected in:

- the earlier grant of *the Financial Advisers (NZX Brokers – Client Money and Client Property) Exemption Notice 2015*; and
- current consultation released by the FMA on the proposed transitional relief for non-NZX brokers to allow limited use of buffers.

40 We instead suggest that brokers be obliged to have (and do have) clear tracking of what is client money and what is not. We consider that this would be sufficient to protect client interests and promote the purposes of the Bill and the FMC Act. We also add that without those tracking systems, the requirement to hold client money and client property separately will not actually help clients.

41 We consider that removing subsection 431X(2) would not adversely impact on section 431ZB, which prohibits a person from using or applying client money or client property received or held on trust for a client by a broker in any way except as expressly directed by the client *or in accordance with section 431X*. The change would simply reflect international trading and settlement mechanics, and we consider that the other brokers' conduct obligations will provide sufficient protection for consumers of broking services.

42 We have some background on this issue, as we acted as the sole legal adviser for the Securities Industry Association on the 2015 exemption notice critical to its members. Please let us know if you would like further assistance on this issue.

Part 5

Question 11

43 We consider financial advisers should not have direct civil liability for breaches of their obligations, and this aspect of the proposed legislation should remain as drafted. In our experience, subjecting both the financial advice provider and the individual financial adviser to civil liability can give rise to a tension between the obligations of each person – for example, where the views of the financial advice provider and the individual financial adviser do not align, in practice, the individual financial adviser is likely to follow its own view (even if it is inconsistent with that of the financial advice provider), on the basis it has ultimate liability for breaches.

44 Further, we anticipate this tension would be exacerbated by the operation of proposed section 431N, which provides that a financial advice provider that engages one or more financial advisers or financial advice representatives to give regulated financial advice must ensure that each adviser and representative complies with the duties on persons giving financial advice in sections 431F to 431M of the draft Bill.

45 In our opinion, the proper forum for individual financial advisers to be held to account is the Financial Advisers Disciplinary Committee (FADC) who can then provide a consistent approach across the industry.

Question 12

46 We support the proposal that the regime allows financial advice providers to run a defence that they met their obligations to have in place processes, and provided sufficient resources to enable their advisers to comply with their duties. It is very important for financial advice providers to have confidence that they will be protected by appropriate defences if they have taken all proper steps to ensure their advisers comply with the legislation.

Question 13

47 We consider the designation power for what constitutes financial advice is appropriate. We support the FMA having flexible powers to address people using technicalities to avoid the law, and respond to innovations and changes within the industry. The designation power could usefully be exercised, for example, to designate information as financial advice in a situation where a KiwiSaver provider is constantly pushing information about its scheme in a way that goes beyond just providing information.

48 The designation should be supported by appropriate procedures to ensure the process is robust, and we consider it should be forward-looking, not retrospective.

Question 14

49 We do not have any comments on this question.

Question 15

50 We do not have any further comments on the drafting of Part 5.

Part 6

Question 16

51 The proposed territorial application of the Financial Service Providers (Registration and Dispute Resolution) Act 2008 will help address the issue of the misuse of the Financial Service Providers Register ('**FSPR**'). However, in our view, the restrictions go too far and may prevent genuine overseas businesses establishing a presence in New Zealand. There are likely to be plausible reasons for an overseas business to wish to establish itself on the FSPR relying, at least initially or even in the long term, on its overseas clientele. If New Zealand is to represent itself as a financial services hub there must be the ability for overseas businesses to have a place of business in New Zealand (providing services such as administration) without necessarily having New Zealand clients.

52 We understand that the concern is entities misusing the FSPR to create the impression that they are licensed or actively regulated in New Zealand. We believe this risk could be appropriately addressed by the proposed regulation to require a person that refers to their registered status (who does not otherwise have a licence) to make clear the limitation of being registered.

Question 17

53 We do not have any concern with the suggestion that a provider be required to provide additional information on the FSPR to assist the public to make decisions about whether they wish to engage with a particular provider. However, we are not convinced that information, such as the provider's AML/CFT supervisor, will assist the public to make this decision. We are not convinced that the difference between the FMA or the Reserve Bank of New Zealand supervising a provider's AML/CFT programme would (or should) make a difference to a person's selection of a provider.

Question 18

54 If the main concern with the misuse of the FSPR is overseas providers using the FSPR to create the impression that they are licensed or actively regulated in New Zealand, then we consider the requirement to explain the limitation of registration should primarily address this issue.

Question 19

55 In section B it would be possible for a person to be both an individual financial adviser and someone who only provides wholesale financial advice, requiring both options 13 and 14 to be selected.

Question 20

56 We do not consider it is appropriate for dispute resolution schemes to provide information to FMA if they believe that a provider may be involved in conduct that constitutes a breach of the relevant financial markets legislation. The primary purpose of the dispute resolution schemes is to provide a dispute resolution process. It is important that providers provide full and open communication to assist that process. Provider concern over possible FMA reporting by a scheme may prevent or limit the provider's involvement in that process and/or may see more providers involving legal advisers in the dispute resolution process. Licensed providers already have a requirement to self-report, and those with supervisors will also be subject to supervisor reporting to FMA. We do not believe it is necessary to also add this requirement to schemes.

Question 21

57 We do not have any further comments on the drafting of Part 6.

Schedule 1 of the Bill

Question 22

58 We consider that a transitional FMC Act DIMS licence granted to AFAs who provide personalised DIMS should expire on the basis currently specified in new clause 63 of Schedule 4 of the FMC Act (that is, on the earlier of the date that a full licence is granted by the FMA and the date the transitional licence is cancelled).

59 We disagree with an AFA's transitional licence expiring on the date on which their current authorisation to provide DIMS expires. This would result in some advisers having a longer period to obtain a full licence than other advisers, based solely on when an adviser's

authorisation was last renewed, potentially providing some advisers with an advantage over others. FMA can use its powers in respect of licensees to obtain any information it would have otherwise obtained through the AFA authorisation renewal process.

Question 23

60 We have the following additional comments on the drafting of Schedule 1 of the Bill:

- We suggest that new clause 63(2)(c)(i) of Schedule 4 of the FMC Act is amended to refer to 'the date that another licence is issued that covers the service provided by A'. This addresses the incorrect reference to 'the person' rather than 'A' (the defined term) and reflects the fact that the individual AFA will not personally be issued a full licence.
- For the avoidance of doubt, we suggest that clause 65(1) of Schedule 4 of the FMC Act also refers to clause 41(6) of Schedule 1 of the FMC Act (which contains the specific certification requirements for eligible investors in respect of financial advice and broking services).
- Clause 66 of Schedule 4 of the FMC Act states that the Code Working Group continues as the code committee 'with the chairperson and other members having the same period of appointment'. It is not clear whether this is a reference to the chairperson and other members having the same period of appointment as *each other*, whether it is intended to refer to the period of appointment specified when the Code Working Group was established continuing to apply to members in their capacity as members of the Code Committee, or both. We recommend this is clarified (for example, in the same way as specified in clause 67 of Schedule 4).
- We suggest that, in clause 68 of Schedule 4 of the FMC Act:
  - It is clarified that an investigation which falls under that clause can subsequently give rise to disciplinary proceedings under subpart 2 of Part 4 of the FA Act. As currently drafted, clause 68 could be interpreted as saying that a disciplinary proceeding cannot be commenced after repeal of the FA Act, even if it results from an investigation that was commenced prior to that repeal.
  - The words 'established under section 103 of the Financial Advisers Act 2008' are added to the end of the wording in brackets at the end of the clause.

Schedule 2 of the Bill

Question 24

61 We believe the FMC Act definition of 'wholesale' should be adopted as the definition of wholesale client for the purposes of financial advice. Under the current regime there is some degree of cross-over between the equivalent concepts: they are very similar but not identical. The differences that exist are confusing and create unnecessary complexity, particularly for offshore-based providers and for persons who are categorised as wholesale clients under one regime but not the other. Complete alignment of the concepts would avoid this confusion and create a simpler regime, which would benefit all participants.

Question 25

62 We agree that the proposed clarification in relation to execution-only services helps address the potential concern that interactions during execution-only transactions could, in some circumstances, be seen to include financial advice.

Question 26

63 While it is not an unintended consequence relating to the minor amendments to the exclusions from financial advice, the way the proposed exclusion in clause 6(f) of Schedule 5 of the FMC Act operates serves to create an uneven playing field as between different product types.

64 The effect of this proposed exclusion is that giving or making available disclosure documents, information in a register entry, and advertisements for financial products does not constitute financial advice. This reflects current law. However, the giving of certain other analogous documents does not have the benefit of this exemption. These include communications published by licensed insurers in respect of their contracts of insurance, and documents published by a DIMS provider other than the disclosure statement required by the FMC Act (or advice provided as part of the DIMS in terms of proposed clause 13(1) of new Schedule 5 of the FMC Act).

65 We think a broader exemption from the relevant document constituting financial advice makes sense, where the providers of those other documents are licensed entities, and the documents themselves fall within the scope of the FMC Act's fair dealing provisions.

Question 27

66 We do not have any comments on this question.

Question 28

67 We do not have any comments on this question.

Question 29

68 We believe the proposed wording relating to the required minimum standards of competence, knowledge, and skill is sufficient to capture the different circumstances in which additional and different standards may be required.

Question 30

69 We believe that it would be inappropriate for a disciplinary committee to consider complaints against financial advice providers as well as complaints against financial advisers. We believe that other existing forums remain the best way to consider complaints against entities.

Question 31

70 If, despite our response to Question 30, the disciplinary committee could consider complaints against financial advice providers we consider a low threshold (say $10,000) should apply.

Question 32

71 We have the following additional comments on the drafting of Schedule 2 of the Bill:

- *Clause 21:* We agree with the submission made by the current code committee to the effect that the new code committee should be given an additional function of liaising with the FMA, the Minister, and other stakeholders in relation to the Code, its application, and its enforcement where the committee considers this to be necessary or desirable in light of the FMC Act's purposes. We agree that this would enhance the new code committee's ability to better promote the achievement of the objectives of the new regime.
- *Clause 28(3)(b)*: We suspect the cross-reference to matters under 'subclause (3)' may be incorrect.

Transitional arrangements

Question 33

72 We believe the four objectives of the transitional arrangements expressed in the Consultation Paper are appropriate and sufficient. We do not recommend complicating the arrangements by adding further objectives.

Question 34

73 We support the proposed staged transition. It supports an orderly transition to the new regime consistent with the stated objectives of the transitional arrangements, minimising the risk of disruption for the benefit of providers and consumers alike.

Question 35

74 Given the very limited criteria that will need to be satisfied, we believe six months from the date the Code is finalised should be sufficient to allow all those who anticipate they will provide financial advice to retail clients in the new regime to either obtain a transitional licence (in the case of providers) or find a prospective licensee to operate under (for financial advisers).

75 A practical concern we have with the timing outlined is that while obtaining a licence may be achievable, some licensees may find that timeframe insufficient to ensure all their systems are in place to support operating in full compliance with the new Code. We would therefore like to see some transitional relief offered for a further six months. During that period, even though the new law is in effect, a transitional defence should be available to providers in case they breach, provided they can demonstrate a commitment to putting appropriate systems in place and the breach relates to a requirement of the new Code to which the provider was not previously subject.

76 In addition, we submit that targeting a February transition is undesirable. Some providers may look to restructure their financial advice proposition to accommodate the new regime, possibly involving the creation of new operating entities. Targeting an April transition deadline is likely to be more conducive to an efficient transition. New entities established to meet the new rules would otherwise have a very short reporting period before the next financial year commences, which is when we anticipate many would look to see their licence commence. Regardless, timing the final lead-up to a transition deadline to occur over the Christmas and January

period is undesirable, and likely to place unreasonable demands on limited resources available at that time.

Question 36

77 We believe the safe harbour proposal, allowing existing financial advisers to continue offering financial adviser services they currently provide without needing to meet any new competence, knowledge, and skills standards, is appropriate. While it may delay the effectiveness of any new, higher standards coming into play, that delay will at most be just two years, allowing a reasonable period for existing advisers to address any competence gaps and minimising the risk of disruption to their existing services.

Question 37

78 We believe all elements of the new regime should come into effect with the transitional licences, subject to the competency 'safe harbour' relief and our proposed transitional defence relief discussed at paragraph 75 above.

Question 38

79 We believe two and a half years from finalising the Code should be sufficient to enable industry participants to become fully licensed and satisfy all competency requirements. We are conscious that the manager licensing period under the FMC Act took the full two years allowed so we would not support a shorter transitional period.

Questions 39 - 42

80 We do not support the option of a temporary exemption for AFAs from meeting the competence, knowledge, and skills standards in the new Code, beyond the two-year safe harbour relief proposed. We believe this would create confusion and the risk of an uneven playing field. If new competency requirements impose a significant step-up for AFAs, the most appropriate body to address that impact is the Code Working Group, and they have flexibility to do so in drafting and consulting on the new Code.

Questions 43 - 45

81 We do not support the option of a competency assessment process for existing AFAs and RFAs. Limiting such a process to those with 10 or more years' experience would create an uneven playing field, and risk undermining consumer confidence in the competency, knowledge, and skills of those registered as financial advisers under the new regime.

82 In our view, the most appropriate body to assess the merits of offering an alternative pathway to experienced AFAs and RFAs is the Code Working Group. Rather than locking-in an alternative process for this group in the legislation, the legislation should simply enable the Code to include such a mechanism, with the Code Working Group best placed to consult on its merits in light of the proposed new standards of competence, knowledge, and skills, once developed.

Questions 46 - 48

83 We do not support the option of a phased approach to licensing.

KensingtonSwan
LAWYERS

Further information

84 We are happy to discuss any aspect of our feedback on the Bill and Consultation Paper.

85 Thank you for the opportunity to submit.

Yours faithfully
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